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WITH THE COMPLIMENTS OF JOHN S. EWART. He will be grateful for expressions of opinion upon the subject discussed.

An Imperial Court of Appeal

OR

The Abolition of All Overseas Appeals

At the Imperial Conference of 1918, the following resolution was passed:

"The Conference is of opinion—

(1) That the question of replacing the present dual system of appeal (*a*) by the constitution of one Imperial Court of Appeal demands the prompt consideration of His Majesty's Government.

(2) That the Lord Chancellor should be invited to prepare and circulate to the Governments of the Dominions and of India, as soon as possible, a memorandum of such proposals as in the opinion of His Majesty's Government are practicable for that purpose with a view to decision at the next Imperial Conference.

(3) That each such Government as soon as possible thereafter shall communicate to the Government of the United Kingdom its views with regard to such proposals.

Under these circumstances, it is fitting that someone should assert that the judges and lawyers of Canada are not incompetent for the work of administering justice in their own country. Canadian bankers are admitted to be capable of managing the affairs of institutions handling hundreds of millions of dollars per annum, without assistance from abroad. Canadian railway men have surplus ability for employment in Australia and France. Canadian manufacturers need no help. Canadian commercial men buy goods from everywhere, but ask advice from nobody. Canadian statesmen deem themselves wise enough to make their own tariff arrangements. On the field of battle Canadians are the equals of any others from anywhere. And the Canadian lawyers—are they incompetent? Are eight millions of Canadians unable to settle their own lawsuits? And if they are, ought they to humiliate themselves by admitting the fact? Were it certain that, by making assertion of our competence in this respect, we should plunge ourselves into judicial chaos for a time, we, nevertheless, ought to

(*a*) United Kingdom appeals go to the House of Lords, while Colonial and Indian cases go to the Privy Council.

make the plunge. But there would be no disaster. On the contrary, with a good deal of experience of the Privy Council, I do most unhesitatingly assert that the administration of our laws would be improved by ceasing to send our cases to England. Our constitution, for example, would have a chance of development along intelligible lines.

Constitutional Cases.—Sometimes it is said that the appeal to the Privy Council ought to be retained in constitutional cases. On the contrary, it is specially with reference to those cases (by far the most important class) that the appeal should be suppressed. We may say that there are altogether three classes of cases: (1) those involving points which might arise in England; (2) those involving points arising out of laws, customs, or situations peculiar to our own system; and (3) those involving constitutional points. In cases of the first class, English judges are as much at home as are our own. In many of the cases of the second class, they are as helpless as are men in other parts of the world who endeavor to adjust settled conceptions to unfamiliar circumstances. And the insuperable difficulty of their Lordships with reference to cases of the third class—the constitutional cases—is that no amount of study of a system of government can compensate for lack of practical experience of it. I venture to say that if British statesmen could grasp the workings of the federal form of government, many of the mistakes in connection with the Irish question would never have been made. Look, for example, at the last of the Home Rule Bills—now a statute. Partial control of the tariff is given to Ireland! Everybody in the United States and Canada knows what the effect would be. British statesmen do not.

PRIVY COUNCIL APOLOGIA.

If we want to know upon what grounds it is argued that Canadians ought to carry their cases to England for final adjudication, we cannot do better than read the defence of the system which their Lordships themselves put forward, when, in 1871, the Australians were endeavoring to establish a close limit upon appeals. It was as follows:

"It is impossible to overlook the fact that this jurisdiction is part of Her Majesty's prerogative, and which has been exercised for the benefit of the colonies since the date of their settlement. It is still a powerful link between the colonies and the Crown of Great Britain, and secures to every subject throughout the Empire the right to redress from the throne. It provides a remedy in many cases not falling within the jurisdiction of the ordinary courts of justice. It removes causes from the influence of local prepossession. It affords the means

of maintaining the uniformity of the laws of England and her colonies, which derive a great body of their laws from Great Britain; and enables them, if they think fit, to obtain a decision in the last resort from the highest judicial authority, composed of men of the greatest legal capacity existing in the metropolis."

Of the eight suggestions of this paragraph, we may, very summarily, rule out six: (1) As to cases "not falling within the jurisdiction of the ordinary courts of justice," there are none such, as far as Canada is concerned. (2) As to the judges being "men of the greatest legal capacity existing in the metropolis," we know that they are excellent for the decision of cases within the limits of their experience and learning; but that they are not so well able to deal with cases outside those limits as are other learned men who have the advantage of them in that respect. (3) As to the jurisdiction being "part of Her Majesty's prerogative," we say that that part of the prerogative has gone the way of all the rest of it. When debating the Australian Commonwealth Bill in the House of Commons, Mr. Haldane (afterwards Lord Chancellor) said:

"that the expression, of which in these debates we have heard much, the 'Queen's prerogative,' is a mere technical phrase and should be put aside."

(4) As to "a powerful link between the colonies and the Crown," we say that long ago the Crown ceased to take any part in the appeals; that the Crown never hears anything about the appeals; and that the decisions are rendered, as their Lordships themselves said, by "men of the greatest legal capacity." (5) As to "every subject throughout the Empire" being entitled to appeal, we say that that privilege is reserved for the rich; no ordinary man can afford it. Unfortunately, however, the rich litigant can take his poor opponent to England against his will. In one case (*a*) a widow of very moderate means obtained a judgment for about $500 in Ontario; was taken to the Privy Council; lost her case there (unjustly, as I think); and was condemned to pay the appellant's costs, amounting to about $3,500 (*b*). She had to pay her own costs also, amounting to about $1,500. "Every subject," moreover, does not include the 45 millions who reside in the United Kingdom. Their cases go to the House of Lords. (6) As to "the right to redress from the throne," we say that appeals never go near the throne, except for signature; and that their Lordships ought to be careful of making pretence that they do.

(*a*) *Schmidt* v. *Miller*.

(*b*) Through association of her case with another, the widow had to pay only one half of this amount.

7. Uniformity of the Laws.

If "uniformity of the laws" be a desideratum, we must commence not with the courts, but with the legislatures. In Canada, we have ten of these making diverse laws; in Australia there are six; and in the United Kingdom, although there is but one parliament, there are frequently diverse laws for the three Kingdoms. We cannot have uniformity in the courts until all these legislatures adopt the practice of passing uniform statutes.

But is uniformity-pressure, by the Privy Council, desirable? In the debate on the Australian Commonwealth Bill, Mr. Asquith gave their Lordships credit for acting on precisely contrary principle. He said that it had been their special care to maintain,

> "most zealously and scrupulously, the integrity of the different systems of laws;" that they "have prevented, as far as they can, any filtration of ideas from a foreign source of law which might permeate and corrupt another system . . . . You cannot have a uniform interpretation of diverse systems of law."

These observations are specially applicable to constitutional questions; and if we should ever have an Imperial Court of Appeal, with Australian and South African judges taking part in the decision of Canadian constitutional cases, it will be impossible that we shall escape endeavors to make our constitution conform to theirs.

The naïveté of the suggestion that the Privy Council would maintain "the uniformity of the laws of England and her colonies" may be appreciated when we remember that the House of Lords and the Privy Council (practically composed of the same judges) are unable to keep themselves in harmony on such an important question as that of a bank's responsibility to its customer in connection with the payment of an altered cheque (*a*). At the Imperial War Conference of 1918, Sir Robert Borden said:

> "And sometimes we have this anomaly, that a decision of the House of Lords which is binding upon English courts, and a decision of the Privy Council which is binding upon the courts of the various Dominions, may not be entirely consistent."

Uniformity with Themselves.

If uniformity be desirable, I am afraid that it will not be from the Privy Council that we shall get it, for, in dealing with Canadian cases, it has exhibited such erratic vacillation as quite disentitles it to be viewed as a consistent authority. Look at a few examples.

(*a*) See *Marshall* v. *Colonial Bank*, 1906, A.C. 559; *Macmillan* v. *The Bank* 145, L. f. 163.

Manitoba School Case.—The Manitoba School Case went twice to the Privy Council (*a*). Upon both occasions, the first question to be determined was whether any rights of Roman Catholics had been prejudicially affected by the Manitoba statute. On the first occasion, their Lordships held that those rights had not been affected; and therefore that the statute was *intra vires*. On the second occasion, their Lordships held that the rights had been affected; and, therefore, that an appeal lay from the provincial statute to the Dominion parliament. As that statement is rather difficult to believe, let me quote from the judgments. In the first case, their Lordships said:

"Such being the main provisions of the Public Schools Act, 1890, their lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union."

After referring to the different provisions of the statute, their Lordships proceeded:

"But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault; it is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike. Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the union."

In the course of the second judgment, their Lordships said:

"The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1800."

After making a comparison of the positions before and after the passage of the statute, their Lordships added:

"In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1800 have not been affected."

Passing on to indicate what ought to be done in order to restore the rights of the Roman Catholics, their Lordships said:

"All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions."

(*a*) 1892, A.C. 445; 1895, A.C. 202

What facts may be considered?—As to whether the interpretation of a constitution can be aided by observation of its antecedents, the Privy Council has given us contradictory rulings. In one case (*a*), their Lordships said:

"It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the constitution and their supposed preference for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation."(*b*).

But in a later case (*c*), the following much more reasonable, but wholly contradictory, statement was made:

"In fashioning the constitution of the Commonwealth of Australia, the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part."

The Succession-Duty Cases.—The series of decisions of the Privy Council in connection with succession-duty statutes is a series of contradictions. There are two ways of regarding the locality of personal estates: They may be regarded as existing in the place where they physically are situated; or they may be deemed to exist in the locality in which their owner resides. Which of these ways was to be applied to estates under the colonial statutes, was the question that came before their Lordships in a series of cases. In the first of them, the court took the view which we may speak of as the physical (*d*). In the second (*e*), without referring to their former decision, their Lordships decided the other way. In the third (*f*), their Lorsdhips agreed with the second. In the fourth (*g*), their Lordships returned to the view which they had announced in the first. In the fifth (*h*) their Lordships differed with numbers one and four and upheld numbers two and three. And in the sixth (*i*), all of the previous decisions were rendered useless by the holding that a succession-duty tax was an indirect

(*a*) *Webb* v. *Outrim*, 1906, A.C. 90.
(*b*) In the court appealed from (Australia) the Chief Justice had said that his court was entitled to assume that some of the framers of the Australian constitution were familiar with the constitution of the United States, and added "When, therefore, under these circumstances, we find embodied in the constitution, provisions undistinguishable in substance, though varied in form, from provisions of the constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation:" Com. L.R. p. 113.
(*c*) *Attorney-General* v. *Colonial Sugar Refining Co.*, 1914, A.C. 237.
(*d*) *Blackwood* v. *Reg.*, 1882, A.C. 82.
(*e*) *Harding* v. *Commissioners, &c.*, 1898, A.C. 769.
(*f*) *Lambe* v. *Manuel*, 1903, A.C. 68.
(*g*) *Woodruff Case*, 1908, A.C. 508.
(*h*) *Rex.* v. *Lovitt*, 1912, A. C. 212.
(*i*) *Cotton* v. *The King*, 1914, A.C. 176.

tax, and, therefore, not within the competence of the only legislatures in Canada which had ever dealt with it, namely, the provincial legislatures.

Effect of Provincial Legislation Outside of the Province.—When dealing with a Dominion temperance statute, their Lordships said that:

"matters which are of a local or private nature from a provincial point of view are not excluded from the category of matters of a merely local or private nature because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province" (*a*).

That statement of the law was completely reversed in a more recent decision of the Privy Council: Money was on deposit in a branch of the Bank of Montreal at Edmonton; a statute of the Province directed the transfer of the money to the Provincial Treasurer; and upon the ground that such transfer would interfere with the right of persons in England to sue the head office of the Bank of Montreal, their Lordships held that the statute was *ultra vires*. They said that the right of the bondholders

"was a civil right outside the Province, and the legislature of the Province could not legislate validly in derogation of that right" (*b*).

—in other words, in direct contradiction of the Manitoba case, the legislation was bad because it produced "an effect outside the limits of the Province."

Local Option.—First, the Dominion parliament (1868), and afterwards the Ontario legislature (1890) enacted statutes giving to municipalities the right to prohibit the sale of intoxicating liquors. The two statutes were substantially the same, with the exception that the Ontario applied only to Ontario, while the Dominion applied to all the Provinces. Questions came before the Privy Council as to the validity of these statutes. One would naturally assume that the result would be the establishment of one jurisdiction or tne other. On the contrary, their Lordships held that both statutes were *intra vires*; that the municipal councils might pass bylaws under the authority of either, or both of them; but that if both were adopted, the Dominion legislation would be that which would be applicable to the locality (*c*).

The reasoning by which the Privy Council arrived at such an extraordinary decision is remarkable. Their Lordships held that

"The Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92;"

(*a*) *Attorney-General of Manitoba* v. *Manitoba Licenseholders' Assn.*, 1902. A.C. 73.
(*b*) *King* v. *The Royal Bank*, 1913, A.C. 283.
(*c*) The Prohibition Case, 1896, A.C., 348.

and that the jurisdiction as to local options was exclusively assigned to the Province by either subsection (13) or (16) of section 92 of the constitution. In a later case, they declared in favor of (16) (*a*). Clause (13) relates to "property and civil rights in the Province." Clause (16) relates to "generally all matters of a merely local or private nature in the Province."

Having thus established that local option was a matter

"exclusively assigned to provincial legislatures;" and that "the Dominion Parliament has no authority to encroach upon any class of subjects"

so assigned, one would have thought that all question was set at rest. That was, however, not their Lordships' view. They said:

"Their Lordships do not doubt that some matters, in their origin, local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation, or abolition, in the interest of the Dominion."

In other words, that matters which were, at one time, local might cease to have that quality, and might

"become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada"—

an observation that would have been quite pertinent had the Ontario statute been passed first and the Dominion afterwards.

There was before their Lordships no evidence that the subject of local option had at any time, or in any way, changed its local characteristic; or that it had ceased to be a subject of local nature; or that it had attained "such dimensions as to affect the body politic of the Dominion;" or that it had "become a matter of national concern." Indeed, it is difficult to imagine how such a subject as local option could cease to be a local matter, and become one which would affect the whole Dominion. At all events, their Lordships did not know whether or not any change had taken place. If there had been no change before 1868, and the subject was still local, the Dominion parliament had no jurisdiction, and its status was *ultra vires*. If, on the contrary, there had been a change, and the subject had ceased to be local, the Ontario statute of 1890 was *ultra vires*. That both statutes were *intra vires* was obviously impossible.

The above instances are quite sufficient to prove the truth of what I have stated, namely, that if we are to get uniformity throughout the King's Dominions, it is not to the Privy Council that we are to look for it.

(a) *Atty.-Gen. Manitoba* v. *Man. Licenseholders' Assn.*, 1902, A.C. p. 73.

8. "Local Prepossession."

We now come to the last of the arguments by which their Lordships supported their jurisdiction, namely, that an appeal to the Privy Council "removes causes from the influence of local prepossession." Unfortunately, for Canada that is true. The people of every locality have their prepossessions; and English judges are no exception to the rule. And so, if, when referring to "local prepossession," the Privy Council meant that Canadian judges are familiar with all the features of the *milieu* in which Canadian cases arise; that they understand the customs and habits which prevail among the Canadian people; and that they are able to observe the features of the cases in their proper perspective and as against appropriate background, then we may confidently affirm that to remove litigation from men so well equipped, and to submit it to judges who carry with them a wholly different set of prepossessions, is to make a very absurd exchange. Experience of the Privy Council has placed that assertion beyond dispute.

The hollowness of the argument as to "local prepossession" may be seen if we ask whether English lawyers would apply it to their own cases. When Mr. Chamberlain proposed an Imperial Court of Appeal, he was told that the idea of submitting English cases to a conglomerate court was ridiculous. That it would help to remove cases from "local prepossession" was true, but, for that reason, the proposal was most heartily condemned. In other words, the principle of exclusion of "local prepossession" is not thought to be applicable to cases arising in the United Kingdom. It was devised merely for the purpose of enabling United Kingdom judges to retain their hold upon colonial cases.

Local Prepossession in Constitutional Cases.

Look at some of the instances of the application of English "local prepossession" to constitutional cases:

No Unconstitutional Statutes.—I should not expect anyone to believe me were I merely to pledge my word that the Privy Council has declared that there is no such thing as an unconstitutional statute under a federal system of government. But perhaps I may be believed when I say that the following is taken from one of the judgments of their Lordships (Italics now added):

> "Every act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed

it were repugnant to the provisions of any Act of parliament extending to the colony, it might be inoperative to the extent of repugnancy (see the Colonial Laws Validity Act, 1865), but, with this exception, *no authority exists by which its validity can be questioned or impeached.* The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, *the statute in question is the law and must be obeyed.* It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests" (*a*).

The case is a striking example of the extent to which a judicial authority

"composed of men of the greatest legal capacity existing in the metropolis" (*b*).

can go absurdly wrong when dealing with a political system of which they have had no experience. Their Lordships imagined that statutes could be "annulled" in the United States, because of some special constitutional grant to the Supreme Court, whereas every lawyer in Australia and Canada knows that statutes cannot be "annulled"(*c*) by any court in the United States, and can be declared to be unconstitutional by every court there. A correspondent of the London *Times*, writing from Australia, said as follows (11 May, 1911):

"Whatever may be thought of the actual decision in the case, there is not a single constitutional authority in Australia who is prepared to defend the reasoning by which it is arrived at. Even the learned editors of the English *Law Quarterly Review* profess themselves 'wholly unable to understand the reasons given by Lord Halsbury.'"

In a subsequent case (*d*), an Australian lawyer was met with very unexpected objection at the hands of the Lord Chancellor when arguing for the unconstitutionality of an income tax statute. The following is taken from the official report (Italics now added):

"MR. POLEY—If this is an implied power under the constitution, that these officers shall not be liable for taxation, the income tax itself must be unconstitutional.

(*a*) *Webb* v. *Outrim*, 1907, A.C. 88. The point involved in the case having again been raised in Australia, the High Court refused to be bound by the P.C. decision: *Baxter* v. *Commissioners of Taxation*—4 C.L.A. 1087.

(*b*) *Ante*, p. 3

(*c*) Mr. A. V. Dicey, one of the most careful students in England of constitutional law, and who has devoted a good deal of time to the study of federal constitutions, falls into the same error as their Lordships of the Privy Council when, contrasting the British Parliament with other law-making bodies, he says "that no person or body is recognized by the law of England as having a right *to override or set aside* the legislation of Parliament."—*Law of the Constitution* (8th ed.), p. xviii.

(*d*) *Commissioners of Taxation* v. *Baxter*, 28th Nov., 1907. This was an application for leave to appeal from the High Court. Leave was refused, legislation having settled the point.

THE EARL OF HALSBURY—I am not aware that there is any power in this Board to disregard an Act of parliament.

MR. POLEY—I imagine that you must look at the constitution to see whether the law was passed in accordance with the constitution, and, assuming that upon an examination of the constitution you find there was no power to pass such a law, the court could say that the law was not in existence—that it was *ultra vires*.

THE EARL OF HALSBURY—*That is a novelty to me. I thought an Act of parliament was an Act of parliament, and you cannot go beyond it.*

MR. POLEY—Here no doubt, but where you have an Act of parliament under a constitution which gives the legislature certain powers, and the legislature goes beyond those powers, the Act is unconstitutional. In that sense under the federal constitution it has been so held.

THE EARL OF HALSBURY—Do you mean if some privilege were given under this Act, and there was an Act passed by the legislature of one of these states, and that Act became an Act of parliament by His Majesty's assent, that could be disregarded by any court?

MR. POLEY—Possibly not af[illegible] period of two years had elapsed; but during the period of two years it migh[illegible] called in question as an unconstitutional exercise of the power.

THE EARL OF HALSBURY—*I do not know what an unconstitutional Act means.*"

Lord Halsbury is a particularly capable man, but he is accustomed to the unitary system of parliamentary government. To him a statute is a statute. To us what appears to be a statute may be a nullity. Lord Halsbury could not understand that.

Canada's Constitution not Federal.—Lord Haldane, owing to his employment at the bar in Canadian cases, had a particularly good opportunity for becoming acquainted with the federal system, but, able man as he is, he remains to this day unfamiliar with the meaning of the word *federal*. During an argument, he used the following language:

"With deference to a great many people who talk on the platform just now of the federal system—in Canada there is no federal system."

In the ensuing judgment, their Lordships said that the constitution of Australia was federal; that the constitution of the United States was "the true federal model;" but that the Canadian constitution was not. Their Lordships said that

"the natural and literal interpretation of the word confines its application to cases in which these states, whi e agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions."

The Canadian constitution, their Lordships said, was not federal for two reasons: (1) because one of the constituting Provinces (Canada) was split into two; and (2) because the Provinces surrendered their constitutio[illegible] and took, by "a fresh departure," a larger constitution (*a*).

(a) *Attorney-General v. Colonial Sugar Refining Co.*, 1914, A.C. 237.

No lawyer in Canada could make the mistake of confounding (as did the Privy Council) a federal constitution with the method by which it was brought into existence. If, for instance, the United Kingdom should now adopt a constitution dividing its territory into ten states, with a constitution exactly similar to that of the United States, the Privy Council would say that the constitution was not federal, because it was formed by disintegration of a previous constitution—that although the British and United States constitutions were identically the same, yet the one was, and the other was not, a federal constitution. Their Lordships would say also that if, when the United States constitution was being formed, New York had been divided into two states, instead of remaining one, the constitution would not have been federal. And to be consistent, they ought to have said that as soon as a fourteenth state was added to the original thirteen, the constitution ceased to be federal. Upon notions of that sort, does the success or failure of some of our appeals to the Privy Council depend.

P[illegible]ogative of the Lieutenant-Governors.—Perhaps the colonial profession were never more startled by any of the decisions of the Privy Council than by that in which their Lordships held that Canadian Lieutenant-Governors had power, apart altogether from the Joint Stock Companies' Acts, to issue, as they pleased, charters of incorporation to companies; and that the Lieutenant-Governors had that power by virtue of the prerogative rights of the Crown. In England, charters are granted in three ways: (1) by a grant from the Crown in the exercise of the Crown's prerogative powers; (2) under the Joint Stock Companies' Acts; and (3) by special act of Parliament. In Canada, prior to the decision, charters were granted only under the Joint Stock Companies' Acts, or by special statute; and nobody had imagined that a Lieutenant-Governor had any authority other than that which he acquired under the provisions of the Joint Stock Companies' Acts. Canadians would unanimously hold that the Lieutenant-Governors receive all the powers which they have from those Acts. The Privy Council, on the contrary, governed by their "local prepossession" as to prerogative authority, held that the powers of the Lieutenant-Governors are plenary, except in so far as the Joint Stock Companies' Acts may have imposed some limitations (*a*).

The Australian Sugar Case.—The Privy Council has held (*b*) that the federal Parliament of Australia had no authority to pass a

(*a*) *Attorney-General* v. *Colonial Sugar Refining Co.*, 1914, A.C. 237.
(*b*) The case referred to is the *Bonanza Gold Mining Co.* v. *The King*, 1916, A.C. 566. The whole subject has been elaborately discussed in *The Canadian Law Times* of 1916, pp. 679 and 769.

statute authorizing the government of the day to issue a commission for the purpose of obtaining information as to the methods by which sugar manufacturers carried on their business—as to the "costs, profits, wages, and prices," etc.; and to provide in the commission for the compulsory attendance of witnesses and the disclosure of matters relating to their business. Such a decision could not, of course, have been arrived at either in Canada or in Australia. And if you ask, how in the world the Privy Council could have so decided?, the only answer is that the case had been removed from Australian "local prepossession" and placed under that of the Privy Council. Their Lordships, after quoting some of the questions that had been put to the manufacturers in the course of the investigations, said:

> "These are examples taken from a series of questions which obviously must disclose many details of the mode in which the company carries on its business. To be compelled to answer them is a serious interference with liberty."

—an interference with liberty, although the questions, as their Lordships said, might

> "be relevant, or even necessary, for the guidance of the legis'ature in the possible exercise of its powers."

With this idea of liberty in their minds, their Lordships reviewed the provisions of the Australian constitution under which the federal Parliament obtained its powers, and added:

> "None of them relate to the general control over the liberty of the subject, which must be shown to be transferred if it is to be regarded as vested in the Commonwealth."

Canadians and Australians do not share their Lordships' view that there is "a serious interference with liberty" when manufacturers are asked for such disclosures as may be necessary for the information of parliament in connection with the regulation of business affairs. Difference in prepossession accounts, in this case as in many others, for difference in opinion (*a*).

An Imperial Court of Appeal.—When the full effect of "local prepossession" upon the administration of justice is understood, the fact becomes apparent that Canada is very much less embarrassed by the present Privy Council arrangement than she would be were an Imperial Court of Appeal to be established. For now we have but one set of "local prepossessions" to combat, whereas in the other case we should have four or five.

(*a*) It should be added that their Lordships did not deny the power of the Australian Parliament to authorise such a commission in connection with the passage of legislation with reference to the subject. But that would of course be useless. What is wanted, first, is the information. The legislation follows. To tell parliament that it can legislate, and, at the same time, appoint a commission to obtain information, would be to sanction something that nobody would want to do.

CARELESSNESS AND INJUSTICE.

Whether it is because the Privy Council is a political contrivance rather than a court of appeal (as we shall see); or because its functions are paternal rather than purely judicial; or because the judges are more impressed with the importance of the local cases which they hear in the House of Lords than of those which relate to matters in distant parts of the world; or because they are free from the local criticism which attends any doubtful decision in the House of Lords, as well as from what a dissenting judge would say if he were allowed to speak (*a*)—whatever the reason, the fact is that the proceedings of the Privy Council are not marked by that scrupulous care which ought to characterize every final tribunal—just because it is final. The following are a few examples:

The Winnipeg Railway Case.—In this case, their Lordships got rid of the most important point by saying that

> "It was not denied by the counsel for the respondents that the powers, rights, privileges, and franchises belonging to the respective companies who were predecessors of the appellants have been taken up and carried forward by reason of the various transactions of amalgamation and otherwise, and are now vested in the appellants" (*b*).

When that statement became known in Winnipeg, clamor was raised by the press and the city council—the Winnipeg *Free Press* saying, among other things:

> "The people of Winnipeg are still waiting to know who is responsible for hauling down the city colors and abandoning the fight, and why Sir Robert Finlay was not instructed to hold the ground already won for the city."

Referring to the decisions of the Manitoba courts, the newspaper added:

> "Both courts decided that the company did not acquire the corporate powers and privileges of the defunct companies, for the reason that those companies had no authority to transfer their powers and privileges, but only to sell their plant and property. In that respect, the city beat the company in both the Courts in this country. On the fight being carried across the Atlantic on appeal, the position thus won for the city against the company was abandoned. Either Sir Robert himself suggested that course, or he was instructed to take it. There is no third supposition possible. Was the City Council, as a whole, consulted? Did the City Council agree to that abandonment of ground that had been won for the city? If so, why? If not, who instructed Sir Robert Finlay to abandon that ground; or agreed with his suggestion that it should be abandoned? The people of Winnipeg are entitled to have answers to these questions.

A third supposition, however, was possible, namely, that the statement of the Privy Council was incorrect; and it became necessary

(*a*) In the House of Lords, dissenting judges express their opinions, if they so desire.
(*b*) *City of Winnipeg* v. *Winnipeg Electric Ry. Co.*, 1912, A.C. 355.

for Sir Robert's junior to explain to the City that the fact which their Lordships said "was not denied" had been stoutly combated in argument, to the extent (at one place alone) of twenty-one pages (about 7,500 words); that their Lordships had taken part in the discussion; and that Counsel did not cease urging the matter until the Lord Chancellor had said:

"I think we now appreciate your point."

Succession-Duty Cases.—As above stated, the series of succession-duty cases is a series of contradictions; but the last of the series (*a*) is chiefly notable because of the assertion that the imposition of succession-duties is *ultra vires* of the provincial legislatures. No one in Canada had ever thought that there was any doubt as to provincial jurisdiction and all the provinces had for years enacted duties upon successions. Their Lordships, however, probably unaware of the effect of their decision upon the whole course of practice in Canada, declared all such statutes to be *ultra vires*. They said:

"Indeed the whole structure of the scheme of these succession-duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons . . . . It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not 'direct taxation.' "

Although that statement remains, it may probably be disregarded, (1) because it is palpably erroneous, and (2) because although the language is of general application, their Lordships were dealing with a particular statute only, (a Quebec statute) which they completely misunderstood. They thought that the declaration required by the statute to be made after the death of the estate owner, would in most cases be made by "the notary before whom the will is executed;" who would be a person without any personal interest in the estate; and who therefore, as their Lordships said,

"must recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein."

But their Lordships entirely misread the statute. By its terms, the notary is *expressly excepted* from among the persons who are to make the declaration. What their Lordships would have thought as to the constitutionality of the statute, had they read it correctly, is a matter of speculation.

(*a*) *Cotton* v. *The King*, 1914, A.C. 176.

The Grand Trunk Pacific Railway Case.—In this extremely important case (*a*), involving more than thirteen million dollars, their Lordships, when deciding in favor of the Grand Trunk bondholders, went completely astray on two very simple, but very important matters of fact. They said that

"It would be a breach of faith with the Grand Trunk Railway Company to let in any further charge in priority to their security."

In so saying, their Lordships had forgotten that the agreements which were said to constitute a breach of faith with the Grand Trunk Railway Company had been submitted to, and *been ratified by a general meeting of the shareholders of that company.* Their Lordships also said that

"the company had no power to issue bonds other than those authorized by the original contract."

But, once more, their Lordships were entirely at fault: (1) There was no authority of any kind to issue bonds in "the original contract"—the authority was contained in the company's charter. (2) Nobody had ever suggested that the company should issue other bonds than those which had been authorized. All that was proposed and agreed to was that *of the same aggregate amount of bonds*, the Government should guarantee more, and the Grand Trunk Railway Company less than as originally contemplated—a provision very beneficial to the company.

The Alberta Railway Case.—In this very important case (*b*), the appellants took two points—say, A and B. In the opening address, the appellants' Counsel abandoned point A, and said with reference to point B,

"I am content really to rest my case on that."

Under those circumstances, Counsel for the respondents did not argue point A. He said with reference to the authorities bearing upon it—

"I will not deal with them after what your Lordship has said;"

and with reference to the relevant statutes, he said:

"As I understand, your Lordships do not desire that I should go through the other statutes dealing with road allowance as distinguished from roads. I am prepared to do so if your Lordships desire it."

To this, the Lord Chancellor said:

"I think we have enough in our minds with regard to that."

(*a*) *Rex* v. *The Grand Trunk Pac. Ry. Co.*, 1912, A.C., 204.
(*b*) *Rex* v. *The Alberta Ry. Co.*, 1912, A.C., 827.

Counsel then proceeded to argue point B, and Lord Dunedin said:

"That is, as I understand, the contention against you," Counsel replying, "The case is now based on contract."

Notwithstanding all this, in giving judgment, their Lordships decided in favor of the appellants upon point A—the point which at the argument was deemed to be unsupportable, and, for that reason, was not fully argued.

The Kelly Case.—Tom Kelly and his two brothers were in partnership as contractors. Tom used moneys of the firm for a large number of private speculations, and the two brothers, having discovered the facts, claimed that the transactions were transactions of the firm. Tom's speculations were of many kinds—stocks, wheat, land warrants, real estate, etc. Sometimes he made purchases partly with his own money and partly with that of the firm—on some occasions using his own money for the first payment, and sometimes using the money of the partnership. He made profits on some transactions and losses on others. And their Lordships held that all the transactions were partnership transactions (*a*).

To my mind, the decision is obviously erroneous. It cannot be that a member of a firm may speculate with partnership money in transactions outside of the scope of partnership purposes, and if he makes losses, charge the amount to the firm. Their Lordships proceeded upon the basis of a statute which provided:

"Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

Their Lordships agreed with the decision of Mr. Justice Cameron, who held that—

"The intention mentioned in the above section of the Act must surely be the intention of all the partners."

If that be the proper interpretation, then the result above mentioned necessarily follows, namely, that one partner can speculate with the moneys of the firm; if he loses, he can charge the loss to the firm; and if he is successful, and can keep the transactions secret, he pockets the money.

But it is not to that point that I wish particularly to call attention. It is rather to this, that there being a large number of transactions involved in the action, their Lordships, during the argument, indicated that they would decide the question of principle only, and would refer to the Master the application of that principle to the circumstances of the various cases. In opening

(*a*) *Kelly* v. *Kelly*.

the argument for the two brothers, Counsel said with reference to the transactions:

"As to two of them it is clear how and from what source the money came from; as to the third I am not sure that there is sufficient evidence, but I do not think that your Lordships will feel disposed (and unless you direct it I should not dream of doing it) to go through some 20 or 30 disputed items and trace them all through.

LORD MACNAUGHTON—That is not our business.

COUNSEL—It is not for your Lordships at all."

Tom's Counsel did not agree with that course of procedure. He argued that it was not feasible—for no single principle would cover the various cases; and he said to their Lordships:

"What would the Master do in such cases as some of these we have heard of—cases in which some of the money, for instance, has been supplied by Thomas and some supplied by the firm. Let me give you as an illustration what is known as the Eaton Case, the purchase of property that was afterwards sold to Mr. Eaton, and is, therefore, known as the Eaton Case. The account will be found on page 1257. I really do not know what the Master would do with this case under a general direction."

Lord MacNaughton said (Italics now added).

"That may give rise to an interesting question about mixing the money *but we have not to deal with that now.*

MR. EWART—I am just thinking what the poor Master would do if he had a direction to ascertain what properties were bought with the moneys of the partnership.

LORD MACNAUGHTON—That may raise very interesting questions.

LORD MOULTON—If the moneys have been mixed the person who has got to disentangle them will find a difficulty, but we have not got to decide that point. We have to decide the general point and give a direction to the Master.

MR. EWART—I am submitting to your Lordships what the Master would have to do in a case of this kind if there is a direction to him to decide the firm's property.

LORD MOULTON—He would have to decide on the facts in each case, and it is not for us to decide on the facts in each case."

Under these circumstances, the particulars of the various questions were not fully argued—some of them were not touched upon. But their Lordships must have forgotten the circumstances, for, in giving judgment, they made a sweeping declaration in favor of the brothers. Forgetfulness may be excused; but Tom's Counsel, immediately after the judgment had been delivered, reminded the judges of what they had said during the argument. They refused nevertheless to order the reference to the Master. Counsel said:

"In view of my learned leader being stopped by your Lordships on the understanding that those matters would be dealt with by the Master on the facts in

each case, I would ask your Lordships to leave that open to us, otherwise we will be estopped."

Lord Moulton, in particular, combated Counsel's request. He said:

"I am afraid we are not competent to vary the order at all."

"This is certainly a re-argument, and as we have affirmed Mr. Justice Cameron's judgment which does find that that was firm's property, I do not see how we can possibly leave it to the Master to decide whether it was or was not."

"I know that Lord MacNaughton in writing this judgment spoke to me about having gone carefully through Mr. Justice Cameron's judgment and being satisfied with it throughout, so I feel satisfied that he meant just as I meant, that it would follow exactly in the lines of Mr. Justice Cameron's judgment."

That is the clearest case of judicial indifference to the rights of a litigant that I have ever known.

Dates of Statutes.—In a case involving construction of British Columbia legislation (*a*), the Privy Council said that two statutes

"were passed in the same session of the British Columbia Legislature, but the latter was c. 37 of the statutes of that year, and the former c. 55 and presumably later in date. If there is a repugnancy between them, the later statute must prevail: *Moore* v. *Robinson*, 2 B. & Ad. 817 at pp. 821, 2."

Each of the statutes carried (as usual) the date of its assent at the top of it. There was, therefore, no necessity for presumption of any kind. And the presumption was erroneous. The statutes were assented to on precisely the same date (*b*). No Canadian lawyer could possibly have fallen into such an error.

DIFFERENT IDEAS AND LANGUAGE.

Crown Lands.—In Canada, Governors and Governments have no power with reference to the disposition of Crown lands other than that bestowed upon them by statute. In England, the Crown does with Crown lands what it pleases. And it was with that English prepossession that I had great difficulty upon one occasion in an argument before the Privy Council (*c*). I was urging that the Crown Land Commissioner of Ontario had no authority to do a certain thing. To support that, I referred to the various clauses of the Crown Lands Act. I saw that I was making no headway, but was at a loss to understand the reason for it. At length, Lord Parker intervened, saying to me (I quote the inter-

(*a*) *Brit. Col. Elec Ry. Co.* v. *Stewart*, 1913, A.C., p. 827.

(*b*) The statutes referred to in the case cited by the Privy Council were assented to on different days, and were, therefore, quite impertinent.

(*c*) *Schmidt* v. *Muller*.

change from recollection merely): "Mr. Ewart, I do not observe that any of your quotations from the statute imposes any limitation upon the action of the Crown." I replied that the quotations were given for the purpose of showing the full extent of the Commissioner's authority. To this, Lord Parker rejoined that surely the Crown had by its prerogative unlimited authority over the Crown lands, and that it rested with me to show that that authority had, in some way, by statute, become qualified with respect to the point under consideration. I think that I succeeded in getting their Lordships to understand that that was not the Canadian view of the matter; but I do not think that they were moved from their prepossession as to the correct view. It was to this unfortunate difference between their ideas and ours that I attribute, to some extent, my loss of the case.

Revised Statutes.—Although the British parliament has been enacting statutes for hundreds of years, there has never been any consolidation or revision of them, and their Lordships are therefore unfamiliar with the relation in which a revised statute stands to the legislation from which it is taken. One case (*a*) turned upon the construction of a revised statute; the interpretation of the prior statute was in my favor; the interpretation of the revised statute was necessarily the same; and I thought my success was assured. But I was defeated; and, by omission from their judgment of all reference to my argument, their Lordships showed that they had not appreciated its strength. They were not accustomed to deal with revised statutes.

Patent and Grant.—In an extremely important case, relating to the exemption of C.P.R. lands from taxation, the argument was principally directed to the meaning of the statutory words—"within twenty years from the grant thereof from the Crown." In addressing the court, I frequently made use of the words "patent from the Crown;" and was much surprised when, after about three-quarters of an hour, Lord Shaw said to me (quoted from memory): "Mr. Ewart, do you not take an unnecessary burden upon yourself by speaking of a 'patent from the Crown'? I observe that the words of the statute are merely 'grant from the Crown.'" I explained that in Canada we used the terms interchangeably. To their Lordships a 'patent from the Crown' was a much more formidable thing than a mere grant; and, in their view, I had been speaking foolishly for my three-quarters of an hour. No harm resulted.

(*a*) *McHugh* v. *The Union Bank.*

Credible Witnesses.

The practical demonstration of the inefficiency of the Privy Council as a court of colonial appeal, as above supplied, is amply sufficient for its condemnation, but it may be well to cite the testimony of some credible witnesses in support of the same conclusion.

Lord Haldane.—Before Lord Haldane became Lord Chancellor, and told us that the constitution of Canada was not federal; that our Lieutenant-Governors had a prerogative right to issue charters of incorporation, as they pleased, etc., he was well aware of the unsatisfactory character of the Privy Council. Referring, in the debate on the Australian Commonwealth Bill, to the fact that the same judges sat both in the House of Lords and the Privy Council, Lord Haldane said:

"If there are two tribunals sitting for the despatch of the same business, the one is starved in order to keep up the other, and the judicial strength inevitably gravitates toward the House of Lords; and until you make the colonials feel that the tribunal to which they come, is the same as that to which you yourselves appeal, you will never get their confidence. The result has been that though the Privy Council is considered good enough for the colonies, it is not allowed in Great Britain and Ireland to be good enough for us."

In a pamphlet published in 1905, Mr. Haldane said:

"Again the state of the Supreme Court of Appeal is unsatisfactory. Just now it is split into the House of Lords, which acts for England, Scotland and Ireland, and the Judicial Committee . . . . which acts for the rest of the King's dominions. The neglect of statesmen has led to the second being starved for the sake of the first. It is no part of the business of the Colonial Office to look after it, and there are murmurs, loud and long, every now and then, over the state of what, after all, is an important link between the colonies and the mother country" (*a*).

Writing in 1909, Prof. A. F. Pollard said that

"it is really not plausible at this day to assert that the working of the Judicial Committee gives general satisfaction" (*b*).

The London *Times.*—In its issue of 28 May, 1913, *The Times* said editorially:

"There have been times in which the Judicial Committee did not rise to the height of its opportunities. A Court of three or four members reviewed, and perhaps overruled, the decisions of half a dozen colonial judges. In such an event, the parties who were unsuccessful in the Privy Council were not satisfied; the Judges who were reversed were apt to feel aggrieved if, as often at one time happened, the Court decided the bare minimum necessary for affirming or reversing, laying hold of a subsidiary issue, determining it, but shirking the responsibility of dealing with the question mainly argued and chiefly in dispute in the Courts below."

(*a*) Quoted by Prof. Pollard in *The British Empire*, p. 771.
(*b*) *The British Empire*, p. 781.

In its issue of the previous day, a writer in *The Times* said:

"Complaints are too often made of late that important appeals have been disposed of by only three Judges, whereas the original tribunals in Canada or Australia were composed of double that number. Two appeals in the present lists are set down to be re-argued—an expensive result which might perhaps have been avoided if the appellate Judges had been more numerous."

The Premiers of Australia.—Mr. Deakin, at the Colonial Conference of 1907, said:

"Since those events the Government, and, I think, the great majority of the Parliament and people of Australia have not altered their attitude upon this question. They are no more contented with the present condition of appeal cases than they were in 1900 or 1901. Nor are their sentiments likely to alter after the judgment given latelty in an Australian case, in which two matters of vital importance came before the consideration of the Judicial Committee."

Mr. Hughes, at the Imperial Conference of 1918, when moving the adoption of the resolution quoted at the commencement of this paper, supplied ample reasons for voting against it. Referring to

"a tendency of late years in the Dominions to limit the appellate jurisdiction of the Judicial Committee,"

Mr. Hughes said:

"One reason for this tendency is clearly that the present system of appeal is not regarded by the Dominions as satisfactory. The idea of an Imperial Court of Appeal—the apex of the whole Judicial system of the Empire—is one that inspires enthusiasm and finds support from reason. But the Judicial Committee never did, and does not now, embody that idea; and in spite of the eminence of the Judges composing it, it does not enjoy throughout the British Dominions that confidence which is essential to the survival."

In perfect agreement with the contention above urged—that it is specially in constitutional cases the Privy Council goes wrong, Mr. Hughes said (Italics now added):

"*Especially in relation to its decisions on the Commonwealth Constitution, the Privy Council has not proved a satisfactory tribunal.* That Constitution has special features of its own—features which differentiate it from the Canadian Constitution, and some of which bear close resemblance to the Constitution of the United States. It is a complex instrument, almost every line of which has its roots in Australian history, and bears the marks of an ultimate compromise between conflicting views. The eminent Judges ordinarily available on the Judicial Committee, for all their legal learning and judicial experience, have not among them a single man who is intimately familiar with this Constitutional document, or with the vital processes underlying it, a knowledge of which is, in the case of any Constitutional document, necessary to a full appreciation of both letter and spirit.

Australia's experience of the Privy Council in constitutional cases has been, to say the least of it, unfortunate. It began with the State income tax cases in

which the question was as to the constitutional power of the State Parliaments to tax the salaries of Federal officers.(*a*) The Australian High Court, in considered judgments, decided against the power and refused to certify, under Section 74 of the Constitution, that the question was one which ought to be decided by the Privy Council. Means were found by the State Governments, however, of getting to the Privy Council an appeal from the State Supreme Court, behind the back of the High Court, and the Privy Council decided in favour of the State power, a decision which the High Court refused to follow. It is not only that the Privy Council differed from the High Court on a question on which the Constitution made the High Court the final arbiter; a more serious matter was that the Privy Council judgment gave good grounds for suspecting a want of familiarity with the fundamental principles of the Constitution.

"A more striking instance of this was the more recent Royal Commission case, Colonial Sugar Refining Company *v.* Brown (*b*). In that case the High Court had certified that one specified question was proper to be decided by the Privy Council, namely, the question whether the Federal Parliament could empower a Royal Commission to compel answers to questions relating to matters not within the direct legislative sphere of the Federal Parliament. *The Privy Council, however, went quite outside the scope of the certificate, and dealt with constitutional matters which had not been referred to it.* Its decision is one which must have caused great embarrassment and confusion, if it were not for the fortunate fact that the reasons for the Judicial Committee's decision are stated in such a way that *no court and no counsel in Australia has yet been able to find out what they were. That is what must happen when a tribunal on the other side of the world, no matter how eminent and experienced its members may be, has cast upon it the duty of interpreting a complicated constitutional document with the history and principles of which no member of the court, and perhaps no counsel practising before the court, is especially familiar.* If you extend those remarks to the circumstances of South Africa, of Canada, or of New Zealand, additional weight will be lent to them."

Mr. Hughes referred, for support, to a declaration of the final Court of Appeal in New Zealand:

"That the decisions of this Court should continue to be subject to review by a Higher Court is of the utmost importance. The knowledge that a decision can be reviewed is good alike for judges and litigants. Whether, however, they should be reviewed by the Judicial Committee, as at present constituted, is a question worthy of consideration. That Court, by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal. If we have spoken strongly, it is because we feel deeply. And we speak under grievous and unexampled provocation."

Mr. Hughes added that he "could multiply instances." His argument told so strongly and obviously against the establishment of his proposed "Imperial Court of Appeal," that Sir Robert Borden interjected at one stage of the speech:

"Is not that rather an argument that each Dominion ought to determine its own constitutional questions?"

(*a*) See ante pp. 9, 10.
(*b*) See ante, pp. 12, 13.

During the address of the Lord Chancellor to the Conference, Mr. Hughes said that

"it is a fact that the Judicial Committee do not understand our law, and they have gone outside the ambit of their authority."

Canadian Opinion.

The Canadian representatives at the Conference declined to support a resolution affirming the advisability of establishing an Imperial Court of Appeal, but agreed to the declaration (above quoted) that the subject "demands the prompt consideration of His Majesty's Government." Sir Robert Borden said:

"Now with respect to the whole question of Appeal Courts, I am inclined to think that according to opinion in Canada we really have about enough of them. Perhaps we may have too many of them.

Mr. Hughes—That is what I am coming at now; you may have too much of them.

Sir Robert Borden—Yes, you have had some experience of the same kind in Australia, but I think you have come through very well. I hope our courts may be wisely guided along the same lines. However that may be, I think we have just about enough Appeal Courts, and I think the tendency in our country will be to restrict appeals to the Privy Council rather than to increase them."

Mr. Rowell said:

"So far as public opinion in Canada is concerned, Sir Robert Borden has correctly stated it. There is no public feeling in Canada on the question of the re-organization of these courts, but there is considerable public feeling in favour of limiting the appeals still further, towards restricting appeals. There is a growing opinion that our own courts should be the final authority. That is the popular opinion. It is an opinion that I am not sure is entertained by all the members of the Bar—perhaps many leading members would be opposed to that view—but there is that popular feeling throughout Canada."

Composite Functions.

The inconsistencies and complications so frequently manifested in the decisions of the Privy Council are due, to some extent, to the fact that it is less a court of appeal than a part of the British form of government. The House of Lords, when discharging its judicial functions, is a court; and its single aim is the application of existing law. The Privy Council, on the other hand, is not, strictly speaking, a court at all. It decides nothing. The documents which are familiarly referred to as its judgments, or decisions, invariably conclude with the words—

"Their Lordships will humbly advise his Majesty that the appeal should be———."

Thus furnished, the King is supposed to consider what ought to be done, and to decide accordingly. He does nothing of the kind.

In this, as in all other affairs of state, he does as advised by his Councillors. And thus, for the purposes of what remains to be said, we must assign to "the Privy Council" its more accurate title: "the Judicial Committee of the Privy Council." It is one of the several committees of the Privy Council which have gradually relieved the King of his duties. The Cabinet is another of them. And the Judicial Committee has never ceased to temper its application of the law with a large admixture of kingly, or paternal, solicitude for the well-being of the colonials, qualified, again, by a strong "local prepossession" in favor of British interests. Let us note two of the most important of these manifestations, under the headings of (1) British political control of the colonies; (2) British financial interests(*a*).

1. *British Political Control of the Colonies.*—Concessions of colonial self-government have always been qualified (1) by the exception of those subjects in which the British people had retained an interest, such as merchant shipping, copyright, etc.; (2) by reservation of the right to refuse assent to bills passed by the Houses of the local legislature; (3) by the right to disallow all bills to which assent may have been given; and (4) by reservation of control over the local judiciary. Colonies were and are permitted to enact such laws only as the British Government approves; final interpretation of those laws is vested in the Judicial Committee; and by these methods political control is maintained.

But is it true that the Judicial Committee ought to be regarded as a political contrivance rather than as an ordinary court of appeal? Undoubtedly it is; for their Lordships, in a memorandum in defence of their jurisdiction, said, in 1875 (Italics now added).

> "To abolish this controlling power and abandon each colony and dependency to a separate Court of Appeal of its own, would obviously be to destroy one of the most important ties connecting all parts of the Empire in common obedience to the courts of law, and *to renounce the last and most essential mode of exercising the authority of the Crown over its possessions abroad* (*b*).

It is for this reason that all attempts to cut down the appellate jurisdiction have been "justly regarded with jealousy" by the British Governments (*c*); and that stout resistance has been offered both to Canadian(*d*) and Australian(*e*) proposals for release.

(*a*) A third manifestation—the appellate jurisdiction from the Prize Courts—is not relevant to the present discussion, save in so far as it powerfully illustrates the "local prepossession" in favor of British interests. See particularly the recent case of the Stigstadt.
(*b*) May's *Constitutional History* (1912), vol. 3, p. 321.
(*c*) Ibid.
(*d*) Keith: *Responsible Government in the Dominions*, vol. 3, p. 1365. The Canadian statute abolishing appeals to the Privy Council in criminal cases (51 Vic., c. 43), on the other hand, passed without serious objection.
(*e*) Ibid, pp. 1365–72; Ewart: *The Kingdom of Canada*, pp. 231–6.

2. *British Financial Interests.*—Although some of the Canadian newspapers have suggested that the reports of the Judicial Committee to the King are sometimes influenced by too careful regard for moneyed interests, all that can fairly be said is that their Lordships sometimes display unusual astuteness in devising unsubstantial arguments in support of the investor, and that similar cleverness, tending to contrary conclusion, is never observable. Turn back, for example, to the indefensible decisions in the case relating to the prerogative of the Lieutenant-Governors(*a*); the Australian sugar case(*b*); the Winnipeg Street Railway case(*c*); and the Grand Trunk Railway case(*d*). Proof, indeed, is quite unnecessary, for one of the grounds put forward by Mr. Chamberlain for his refusal to agree to the provisions in the draft of the Australian Commonwealth Bill, limiting appeals to the Judicial Committee, was that the British Government was under bounden duty (Italics now added)—

"to protect the interests of the United Kingdom and of other parts of the Empire which are also committed to their charge. The question of the right of appeal must also be looked at from the point of view of the *very large class of persons interested in Australian securities or Australian undertakings, who are domiciled in the United Kingdom*" (*e*).

The reply of the Australian delegates to all these reasonings was rather good:

"British investors are content to lay out their money in other parts of the world under alien laws interpreted by alien tribunals. Australians will be prone to doubt that such investors can be seriously alarmed at the proposal of having afforded to their investments in Australia the security of British laws administered by British judges, a security which will never be questioned"(*f*).

Dealing with Mr. Chamberlain's appeal to "the links of Empire," the delegates said:

"The consciousness of kinship, the consciousness of a common blood and a common sense of duty, the pride of their race and history, these are the links of Empire; bands which attach, not bonds which chafe. When the Australian fights for the Empire, he is inspired by those sentiments; but *no patriotism was ever inspired or sustained by any thought of the Privy Council*" (*g*).

SUMMARY.

Summing up what has been said, my contention is that we ought to cease sending our cases to the Privy Council in London for the following, amongst other, reasons:

(*a*) Ante, p. 12
(*b*) Ante, p. 12
(*c*) Ante, p. 14
(*d*) Ante, p. 16
(*e*) Ewart: *The Kingdom of Canada*, p. 232.
(*f*) Ibid., p. 233.
(*g*) Ibid., p. 234.

I. The practice is not consistent with our national self-respect.

II. The administration of justice would be improved by cessation of the practice.

III. It is principally in connection with constitutional cases that we suffer by appeal to the Privy Council.

IV. The appeal is not "a powerful link between the colonies and the Crown." It is only a mark of degrading subordination.

"No patriotism was ever inspired or sustained by any thought of the Privy Council."

V. It is not true that the practice

"secures to every subject throughout the Empire the right to redress from the Throne," for

(1) Only the wealthy subjects can exercise the right.

(2) The redress does not come from the Throne, but from some British Judges.

VI. As to uniformity of the laws—

(1) We do not desire uniformity of interpretation of diverse laws.

(2) Uniformity in Canada of some of the provincial laws would undoubtedly be beneficial; but to bring our laws into harmony with those of England, Scotland, Ireland, Australia, South Africa, New Zealand, and India, is a project neither possible of accomplishment, nor desirable.

(3) If uniformity is necessary, it is not from the Privy Council that it can be derived. That body finds uniformity amongst its own decisions quite impossible. For example—

(A) In the Manitoba School Cases, their Lordships said both that the rights of the minority had been affected, and that they had not.

(B) Their Lordships have said both that the antecedents of a constitution may be looked at for the purpose of its interpretation, and that they may not.

(C) The series of decisions in the succession duty cases is a series of contradictions.

(D) Their Lordships have said that a provincial statute is not *ultra vires* merely because it produced "an effect outside the limits of the Province," and have also said that the production of such an effect does render the legislation *ultra vires*.

(E) Their Lordships have held that a Dominion statute permitting local option with reference to liquor licenses was valid; and they have also held that the Ontario Legislature could, after

passage of the Dominion statute, validly enact a similar statute; although that is obviously incorrect.

VII. Their Lordships have argued that the appeal to the Privy Council "removes causes from the influence of local prepossession." Unfortunately, it does remove cases from Canadian prepossession, and places them under prepossession of opposing character in London. English lawyers very wisely will not permit their cases to be removed from local prepossession, and submitted to judges with different prepossessions. Note the following—

(1) British prepossession has induced their Lordships to say that there is really no such thing as an unconstitutional statute.

(2) Similar prepossession has induced their Lordships to say that the Canadian constitution is not of federal character.

(3) Similar prepossession has induced their Lordships to hold that the Canadian Lieutenant-Governors have a prerogative right to charter joint stock companies.

(4) Similar prepossession has induced their Lordships to hold that the federal parliament of Australia has no authority to pass a statute authorizing the government of the day to issue a commission for the purpose of obtaining information which might (in their Lordships' language)

"be relevant, or even necessary, for the guidance of the legislature in the possible exercise of its powers."

VIII. Whether owing to multiplicity of engagements, or to the absence of such a feeling of responsibility as Judges of the regular courts acknowledge, the fact is that, not infrequently, cases are disposed of by the Privy Council in palpably unsatisfactory form, and with unjust results. For example—

(1) In one case their Lordships disposed of the principal point in debate by saying quite erroneously, that Counsel had conceded it.

(2) Their Lordships declared that the imposition of succession duties was *ultra vires* of the Quebec Legislature. But in so holding, their Lordships completely misread the provisions of the statute, and left everybody in doubt as to what would have been held if they had more carefully observed the language with which they were dealing.

(3) In another (a $13,000,000) case, their Lordships were able to decide in favor of the Grand Trunk Railway bondholders by going completely astray on two very important matters:—

(A) They said that to hold otherwise would be to sanction a breach of faith with the Grand Trunk Railway Company—not

observing that what had been done had been ratified by a general meeting of the shareholders of that company.

(B) They thought that the case of the Government depended upon "the power to issue other bonds than those authorized by the original contract." But there was nothing in the original contract about the issue of bonds; and nobody had suggested the issue of any other bonds than those which had been otherwise authorized.

(4) In another case, appellants' Counsel, on the argument, abandoned one of his two points, and rested his case on the other. This other point was therefore not argued by the Counsel for the respondents. And their Lordships decided in favor of the appellants upon the point abandoned and not argued.

(5) Another case involved the decision of a large number of cases. During the argument, their Lordships refused to permit discussion of each of the cases, saying that some general principle would be declared, and all the cases be referred to the Master for investigation. In giving judgment, their Lordships made a sweeping declaration of all the cases in favor of the appellants. Their attention was immediately called to what they had said during the argument. Nevertheless, they refused to order the reference to the Master. I repeat what I have already said—

"That is the clearest case of judicial indifference to the rights of a litigant that I have ever known."

IX. Not only are their Lordships' local prepossessions quite contrary to those which obtain in Canada, but difference in ideas and languages is sometimes productive of embarrassment during the argument, and of injustice in the judgment. For example—

(1) In England, the Crown's prerogative enables it to deal with Crown lands as it pleases. With us, the authority of the ministers of the Crown is derived exclusively from our statutes. This difference in ideas induced their Lordships to regard an Ontario statute, not as enabling the Commissioner of Crown Lands to deal with the lands, but as some qualification of the prerogative power of the Crown.

(2) Their Lordships are unaccustomed to deal with "revised" or "consolidated" statutes, and they are not familiar with the rules of interpretation applicable to such statutes. In one case this lack of familiarity led to injustice.

(3) In Canada, we use the phrases "patent from the Crown," and "grant from the Crown" interchangeably. To their Lordships,

a "patent" is something very much more important than a "grant;" and in one case the difference in phraseology led to misunderstanding during the argument.

X. In the preceding exposition, I have but supplied evidence of the correctness of what has been said, at various times, by persons whose authority will hardly be disputed. For example—

(1) Lord Haldane, while yet at the Bar, said that the judicial strength of the Privy Council was "starved" in order to keep up the House of Lords.

"Until," he said, "you make the colonials feel that the tribunal to which they come is the same as that to which you yourselves appeal, you will never get their confidence. The result has been that though the Privy Council is considered good enough for the colonies, it is not allowed in Great Britain to be good enough for us."

(2) Prof. Pollard said that

"it is really not plausible at this day to assert that the working of the Judicial Committee gives general satisfaction."

(3) The London *Times* reflected upon the practice by which

"a Court of three or four members reviewed, and perhaps overruled, the decisions of half a dozen colonial Judges."

(4) Mr. Deakin, when Premier of Australia (1907), said that the people of Australia

"are no more contented with the present condition of appeal cases than they were in 1900 or 1901. Nor are their sentiments likely to alter, after the judgment given lately in an Australian case, in which two matters of vital importance came before the consideration of the Judicial Committee."

(5) Mr. Hughes, as Premier of Australia, referring to the tendency on the part of the Dominions to limit the appellate jurisdiction of the Privy Council, said (1918):

"One reason for this tendency is clearly that the present system of appeal is not regarded by the Dominions as satisfactory . . . . Especially in relation to its decisions on the Commonwealth constitution, the Privy Council has not proved a satisfactory tribunal. That constitution has special features of its own —features which differentiate it from the Canadian constitution, and some of which bear close resemblance to the constitution of the United States. It is a complex instrument, almost every line of which has its roots in Australian history, and bears the marks of an ultimate compromise between conflicting views. The eminent Judges ordinarily available on the Judicial Committee, for all their legal learning and judicial experience, have not among them a single man who is intimately familiar with this constitutional document, or with the vital processes underlying it, a knowledge of which is, in the case of any constitutional document, necessary to a full appreciation of both letter and spirit."

(6) Sir Robert Borden, speaking upon the proposal for an Imperial Court of Appeal, said:

"I think we have just about enough Appeal Courts, and I think the tendency in our country will be to restrict appeals to the Privy Council rather than to increase them."

(7) Mr. Rowell said:

"There is no public feeling in Canada on the question of the re-organization of these courts, but there is considerable public feeling in favour of limiting the appeals still further, towards restricting appeals. There is a growing opinion that our own courts should be the final authority. That is the popular opinion."

XI. During the earlier stages of Canada's colonialism, something could be said for subjecting our lawsuits to the final disposition of a body which was less a court of justice than a political contrivance for the exercise of

"the authority of the Crown over its possessions abroad;"

and for the comfort of

"the very large class of persons interested in colonial 'securities' or colonial 'undertakings,' who are domiciled in the United Kingdom."

Surely the day has come when Canadians will no longer tolerate the existence of an institution which has for its object (1) British control of Canadian affairs, and (2) British amendment, "from the point of view" of British investors, of the decisions of Canadian courts.

I would not have it thought that the material for the present paper has been collected with difficulty and labor. On the contrary, the cases dealt with are, without exception, those in which I have been personally engaged, or which, on account of their notoriety, have been brought to my attention. Any Privy Council practitioner can easily supply other instances of similar indefensibility.

Ottawa, April, 1919.

JOHN S. EWART.